

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

DANIEL SALUS,

Plaintiff,

vs.

Case No.: 2:10-cv-01734-GMN-GWF

ORDER

STATE OF NEVADA, *ex. Rel. Board of*
Regents of the Nevada System of Higher
Education, on behalf of UNIVERSITY OF
NEVADA, LAS VEGAS, a political
subdivision of the State of Nevada;
KAREN WEST, *Individually and as Dean*
of the School of Dental Medicine of the
University of Nevada, Las Vegas,
Defendants.

INTRODUCTION

Before the Court is Defendants, The State of Nevada ex rel. Board of Regents of Nevada System of Higher Education, on behalf of University of Nevada, Las Vegas (collectively “UNLV”) and Karen West’s Motion to Dismiss (ECF No. 2). Plaintiff Daniel Salus filed a Response (ECF No. 9) and Defendants filed a Reply (ECF No. 11).

FACTS AND BACKGROUND

Plaintiff Daniel Salus was a student at University of Nevada, Las Vegas School of Dental Medicine from August 2007 until June 2010. (Compl. ¶9, ECF No. 1–1.) In June 2010, Karen West, Dean of the School of Dental Medicine, issued a decision that Daniel Salus be suspended from the University’s dental program due to the fact that he had allegedly failed two exams. (*Id.*) Plaintiff attempted to appeal the decision pursuant to the terms of the University’s School of Dental Medicine Student Handbook but was apparently denied any appeal process. (*Id.* at ¶¶ 10–11.) Plaintiff alleges that he was denied the opportunity to appeal in retaliation for him asserting

1 his due process and civil rights in prior disputes with West and other faculty members and
2 administrators. (*Id.* at ¶ 12.) As a result of his suspension, Plaintiff asserts that he is unable to
3 fulfill his duties as a member of the United States Armed Forces, which requires him to be
4 enrolled in dental school and to provide dental services. (*Id.* at ¶ 13.)

5 Plaintiff asserts six causes of action: (1) due process and equal protection violations
6 under 42 U.S.C. §1983; (2) breach of contract; (3) negligence and negligent hiring, training, and
7 supervision; (4) intentional and negligent infliction of severe mental distress; (5) injunctive and
8 declaratory relief; and (6) defamation, libel and slander per se.

9 **DISCUSSION**

10 **I. LEGAL STANDARD-MOTION TO DISMISS**

11 Federal Rule of Civil Procedure 8(a)(2) requires only “a short and plain statement of the
12 claim showing that the pleader is entitled to relief” in order to “give the defendant fair notice of
13 what the . . . claim is and the grounds upon which it rests.” *Conley v. Gibson*, 355 U.S. 41, 47
14 (1957). Federal Rule of Civil Procedure 12(b)(6) mandates that a court dismiss a cause of action
15 that fails to state a claim upon which relief can be granted. A motion to dismiss under Rule
16 12(b)(6) tests the complaint’s sufficiency. *See North Star Int’l. v. Arizona Corp. Comm’n.*, 720
17 F.2d 578, 581 (9th Cir. 1983). When considering a motion to dismiss under Rule 12(b)(6) for
18 failure to state a claim, dismissal is appropriate only when the complaint does not give the
19 defendant fair notice of a legally cognizable claim and the grounds on which it rests. *See Bell*
20 *Atl. Corp. v. Twombly*, 550 U.S. 544, 554, 127 S.Ct. 1955, 1964 (2007). However, facts must be
21 sufficient to edge a complaint from the conceivable to the plausible in order to state a claim. *Id.*
22 In considering whether the complaint is sufficient to state a claim, the court will take all material
23 allegations as true and construe them in the light most favorable to the plaintiff. *See NL Indus.,*
24 *Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). The court, however, is not required to accept
25 as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable

1 inferences. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

2 The Supreme Court recently clarified that, in order to avoid a motion to dismiss, the
3 complaint must contain “factual content that allows the court to draw the reasonable inference
4 that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949
5 (2009). The Court in *Ashcroft* further stated “[w]here a complaint pleads facts that are “merely
6 consistent with” a defendant’s liability, it “stops short of the line between possibility and
7 plausibility of entitlement to relief.”” *Id.* Therefore, merely making an allegation is not enough
8 to survive a motion to dismiss; facts that a particular defendant may plausibly be liable for the
9 alleged conduct must be pled.

10 If the court grants a motion to dismiss, it must then decide whether to grant leave to
11 amend. The court should “freely give” leave to amend when there is no “undue delay, bad
12 faith[,] dilatory motive on the part of the movant . . . undue prejudice to the opposing party by
13 virtue of . . . the amendment, [or] futility of the amendment” Fed. R. Civ. P. 15(a); *Foman*
14 *v. Davis*, 371 U.S. 178, 182 (1962). Generally, leave to amend is only denied when it is clear
15 that the deficiencies of the complaint cannot be cured by amendment. *See DeSoto v. Yellow*
16 *Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992).

17 **II. CONSTITUTIONAL CLAIMS**

18 Plaintiff alleges “a *de facto* policy of Defendant UNLV, which is implemented by Deans
19 and other employees... who chose to violate Plaintiff’s constitutional rights” (Compl. at ¶16.) It
20 further alleges “[s]upervisory and policy making officers and officials of said Defendants have
21 known the existence of the *de facto* policy described above for a substantial period of time.”
22 Plaintiff alleges substantive and procedural due process denial of his rights arising from this *de*
23 *facto* policy. *See Monell v. Dep’t of Social Services of City of New York*, 436 U.S. 658, 690 n.
24 55, 691, 98 S.Ct. 2018 (1978). “[T]he Supreme Court has expressly declined to extend *Monell*’s
25 theory of municipal liability under § 1983 to state entities.” *Krainski v. Nevada ex rel. Bd. of*

1 *Regents of Nevada System of Higher Education*, 616 F.3d 963 (9th Cir. 2010) (citing *Will v.*
2 *Michigan Dept. of State Police*, 491 U.S. 58, 70-71, 109 S.Ct. 2304 (1989)). Accordingly,
3 Plaintiff may not bring an action against UNLV or the UNLV employees in their official
4 capacities under *Monell*.

5 However, it appears undisputed that injunctive relief may be imposed against the
6 individual Defendants sued in their official capacities. *Will v. Mich. Dep't of State Police*, 491
7 U.S. 58, 71 n. 10 (1989) (“a state official in his or her official capacity, when sued for injunctive
8 relief, would be a person under § 1983 because ‘official-capacity actions for prospective relief
9 are not treated as actions against the State.’”) (citations omitted). Therefore, Plaintiff’s claims
10 do survive to the extent they are seeking injunctive relief against Dean West. Moreover, this
11 does not prevent Plaintiff from bringing claims against the UNLV employee in her personal
12 capacity. However, West may be entitled to qualified immunity.

13 A. Qualified Immunity

14 “State officials are entitled to qualified immunity from suits for damages ‘insofar as their
15 conduct does not violate clearly established statutory or constitutional rights of which a
16 reasonable person would have known.’” *Krainski v. Nevada ex rel. Bd. of Regents*, 616 F.3d
17 963, 968 (9th Cir. 2010)(citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727
18 (1982)). “Determining whether officials are owed qualified immunity involves two inquiries:
19 (1) whether, taken in the light most favorable to the party asserting the injury, the facts alleged
20 show the officer’s conduct violated a constitutional right; and (2) if so, whether the right was
21 clearly established in light of the specific context of the case.” *al-Kidd v. Ashcroft*, 580 F.3d
22 949, 964 (9th Cir.2009) (citing *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151 (2001)). “For
23 a constitutional right to be clearly established, its contours must be sufficiently clear that a
24 reasonable official would understand that what he is doing violates that right.” *Hope v. Pelzer*,
25 536 U.S. 730, 739, 122 S.Ct. 2508 (2002) (internal quotation marks omitted).

1 Plaintiff alleges that West violated his procedural and substantive due process rights by
2 suspending him from the dental program without notice and a hearing and thereafter by refusing
3 to allow him to appeal his suspension according to the University's School of Dental Medicine
4 Student Handbook.

5 i. Procedural Due Process

6 A procedural due process claim has two elements: deprivation of a constitutionally
7 protected liberty or property interest and denial of adequate procedural protection. *Brewster v.*
8 *Bd. of Educ. of the Lynwood Unified Sch. Dist.*, 149 F.3d 971, 982 (9th Cir.1998). Defendants
9 do not contest that Plaintiff has a property interest in his education. Instead they argue that he
10 was given adequate procedural protection.

11 In the context of school suspensions, the Supreme Court has distinguished between the
12 due process required for suspensions for academic reasons and suspensions related to discipline
13 or conduct. *Bd. of Curators of the Univ. of Missouri. v. Horowitz*, 435 U.S. 78, 98 S.Ct. 948
14 (1978). The Supreme Court in *Horowitz* was faced with a situation where a student was
15 dismissed for academic reasons. The Court held that there was no violation of due process
16 where the student was fully informed of faculty dissatisfaction with her clinical progress and the
17 consequent threat of her graduation and continued enrollment notwithstanding lack of a formal
18 hearing. It further held that dismissals for academic (as opposed to disciplinary) cause do not
19 necessitate a hearing before a school's decision-making body.

20 Plaintiff argues that the minimal requirement of due process before a student is
21 suspended is a notice and a hearing under *Goss v. Lopez*, 419 U.S. 565 (1975). However, *Goss*
22 had to deal with a student's suspension following a student's misconduct. The Supreme Court
23 in *Horowitz*, specifically distinguished *Goss* and held that no such hearing was required for
24 academic suspension. In fact, all of the cases cited by Plaintiff for the proposition that notice
25 and a hearing must be held, deal with misconduct and not academic suspensions. *See Dixon v.*

1 *Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961)(students expelled for
 2 misconduct); *Marin v. University of Puerto Rico*, 377 F.Supp.613 (D.P.R. 1974) (suspension of
 3 students for alleged misconduct); *Fellheimer v. Middlebury College*, 869 F.Supp. 238, 246-247
 4 (D. Vt. 1994)(student faced with disciplinary charges for misconduct); *Crook v. Baker*, 584
 5 F.Supp. 1531, 1556 (E.D. Mich. 1984)(student charged with fabricating data underlying his
 6 thesis was entitled to a hearing).

7 Defendants argue that Plaintiff does not allege that he was not fully informed via the
 8 Dental Medicine Student Handbook and the Joint Commission on National Dental Examinations
 9 (JCNDE) that he would not be allowed to continue on to his fourth year of school until he
 10 passed Part I of the National Board of Dental Examinations (NBDE). Under *Horowitz*, it
 11 appears that there would be no need for a hearing unless Plaintiff can prove that he was not fully
 12 informed of his academic requirements. Plaintiff does not allege any facts regarding whether he
 13 was or was not put on notice of being suspended if he failed two exams. Accordingly, this claim
 14 is dismissed with leave to amend.

15 ii. Substantive Due Process

16 The use of substantive due process to extend constitutional protection to economic and
 17 property rights has been “largely discredited.” *Armendariz v. Penman*, 75 F.3d 1311, 1318–19
 18 (9th Cir. 1996). Substantive due process primarily protects those liberties “deeply rooted in this
 19 Nation’s history and tradition,” *Moore v. East Cleveland, Ohio*, 431 U.S. 494, 503, 97 S.Ct.
 20 1932, (1977), such as marriage, procreation, contraception, family relationships, child rearing,
 21 education, and an individual’s bodily integrity. See *Planned Parenthood v. Casey*, 505 U.S. 833,
 22 851, 112 S.Ct. 2791, (1992); *Armendariz*, 75 F.3d at 1319.

23 Whether a student who is subject to academic dismissal may maintain a cause of action
 24 for the violation of his right to substantive due process remains an open question. See *Regents of*
 25 *the Univ. of Michigan v. Ewing*, 474 U.S. 214, 222–23, 106 S.Ct. 507 (1985). However courts

1 have allowed such suits to proceed based on an assumption that such a right exists. *See*
2 *Richmond v. Fowlkes*, 228 F.3d 854 (8th Cir. 2000). To constitute a violation of substantive due
3 process, the school official's action must have been based on unconstitutional criteria or have
4 been arbitrary and capricious. *See Ewing*, 474 U.S. 214.

5 Further, Plaintiff also argues that it would be a violation of his substantive due process
6 rights for Defendant West to ignore the school's own due process safeguards. *See generally*
7 *Ahlum v. Administrators of the Tulane Educ. Fund*, 617 So.2d 96, 98–99 (La. Ct. App. 1993). It
8 is unclear whether or not this claim should be dismissed. The Court will allow this claim to go
9 forward to determine if the actions of Dean West were arbitrary and capricious.

10 iii. Equal Protection

11 An equal protection claim requires a showing that the state actor treated classes of people
12 differently based on their class without justification, “[t]he Equal Protection Clause ensures that
13 all persons similarly situated should be treated alike.” *Squaw Valley Dev. Co. v. Goldberg*, 375
14 F.3d 936, 944 (9th Cir. 2004). Plaintiff does not allege any facts that he was treated differently
15 than similarly situated students. Plaintiff must allege some facts that would give rise to an
16 inference that Plaintiff was treated differently than the other students. Just reciting the elements
17 does not state a claim...etc. Accordingly this claim is dismissed with leave to amend.

18 **III. STATE LAW CLAIMS**

19 A. Breach of Contract

20 Defendants argue that West should be dismissed from Plaintiff's breach of contract claim
21 because there are no allegations that West was a party to a contract. Plaintiff alleges that he has
22 an express and implied contract with Defendants in connection with the rights explicitly
23 guaranteed by UNLV pursuant to the University's School of Dental Medicine Student
24 Handbook, NSHE Code, and the UNLV Student Handbook. In his Response, Plaintiff does not
25 address Defendants' arguments that West should be dismissed from this cause of action. Instead

1 Plaintiff only addresses a contractual relationship that was allegedly formed with the University.
2 Accordingly, the Court finds that Plaintiff has not stated a breach of contract claim against
3 Defendant West. Plaintiff will be allowed to amend the complaint if he can allege facts that
4 Dean West was a party to a contract with Plaintiff.

5 However, the court does find that Plaintiff has alleged a claim against UNLV for breach
6 of contract. Plaintiff alleges that the University's School of Dental Medicine Student
7 Handbook, NSHE Code, and the UNLV Student Handbook create a contractual relationship
8 obligating the University to follow its established procedures. Plaintiff sufficiently alleges that a
9 contract was formed with UNLV arising from the rights guaranteed to him in the conduct codes,
10 that UNLV breached the contract and that Plaintiff was damaged.

11 B. Negligence

12 To state a claim for a negligence under Nevada law, a plaintiff must allege (1) duty,
13 (2) breach, (3) causation, and (4) damages. *Wiley v. Redd*, 885 P.2d 592, 595 (Nev. 1994).
14 Plaintiff asserts that Defendants owed a duty of care to their students who paid tuition to the
15 University and that they breached this duty by refusing to treat Plaintiff with fundamental
16 fairness and afford him due process as promised in the conduct codes. Plaintiff does not cite to
17 any authority that a university owes a general duty of care. This court does not find that there is
18 such a general duty of care. *See Lucey v. Nevada ex rel. Bd. of Regents of Nevada System of*
19 *Higher Education*, 2007 WL 4563466, *6, Case No. 2:07-cv-00658-RLH-RJJ (D.Nev., Dec. 18,
20 2007) (citing *Johnson v. State*, 894 P.2d 1366, 1368 (Wash.App.Ct.1995) (universities owe no
21 general duty of care to their students). Accordingly the Court dismisses Plaintiff's claim for
22 negligence without leave to amend.

23 C. Negligent Hiring, Training and Supervision

24 "The tort of negligent hiring imposes a general duty on the employer to conduct a
25 reasonable background check on a potential employee to ensure that the employee is fit for the

position.” *Burnett v. C.B.A. Sec. Serv., Inc.*, 820 P.2d 750 (Nev.1991). An employer breaches this duty if he hires an employee when he knew or should have known of the employee’s dangerous propensities. *Hall v. SSF, Inc.*, 930 P.2d 94 (Nev.1996).

Plaintiff alleges that “Defendant UNLV had a duty to protect ... Plaintiff, from the illegal actions of their own agents, officers, employees and others” and that “Defendant UNLV had the duty not to hire individuals with a propensity towards committing unlawful acts against the public, and to adequately train and supervise their employees.” Plaintiff does not state specific facts but instead makes conclusory allegations. The complaint does not contain “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 129 S.Ct. at 1949. Merely, making an allegation is not enough to survive a motion to dismiss; facts that a particular defendant may plausibly be liable for the alleged conduct must be pled. Accordingly, the Court dismisses this claim with leave to amend.

D. Intentional Infliction of Emotional Distress

To establish a claim for intentional infliction of emotional distress, a plaintiff must prove: “(1) extreme and outrageous conduct with either the intention of, or reckless disregard for, causing emotional distress, (2) the plaintiff having suffered severe or extreme emotional distress, and (3) actual or proximate causation.” *Olivero v. Lowe*, 995 P.2d 1023, 1025 (Nev.2000). For conduct to be extreme and outrageous it must rise to a level that is “outside all possible bounds of decency and is regarded as utterly intolerable in a civilized community.” *Maduikie v. Agency Rent-A-Car*, 953 P.2d 24, 26 (Nev.1998). Plaintiff’s complaint is devoid of any factual content regarding any conduct that is so extreme and outrageous to satisfy the first element for IIED. Therefore this claim is dismissed with leave to amend.

E. Negligent Infliction of Emotional Distress

The tort of negligent infliction of emotional distress historically compensated a bystander

1 for suffering serious emotional distress resulting in physical symptoms caused by apprehending
 2 the death or serious injury of a loved one due to a defendant's negligence. *Chowdhry v. NLVH*,
 3 851 P.2d 459, 462 (Nev.1993). Nevada has extended this tort where the defendant committed
 4 the negligent act directly against the plaintiff. *Id.* Where the plaintiff's emotional distress
 5 damages "are not secondary to physical injuries, but rather, precipitate physical symptoms,
 6 either a physical impact must have occurred or, in the absence of physical impact, proof of
 7 'serious emotional distress' causing physical injury or illness must be presented." *Olivero*, 995
 8 P.2d at 1026.

9 Plaintiff's Complaint contains no allegations asserting that his severe emotional distress
 10 manifested into physical injury or illness. Plaintiff alleges only that his mental distress has
 11 caused him "to suffer great mental and emotional harm, anguish, insecurity, self-revulsion,
 12 damage to his self-esteem and self-worth, shame and humiliation, including but not limited to
 13 severe and clinical depression, anxiety, loss of sleep, and change of appetite." (Compl. at ¶ 36.)
 14 Accordingly, this claim is dismissed without leave to amend.

15 G. Defamation, Libel and Slander Per Se

16 In order to establish a prima facie case of defamation, a plaintiff must prove: (1) a false
 17 and defamatory statement by defendant concerning the plaintiff; (2) an unprivileged publication
 18 to a third person; (3) fault, amounting to at least negligence; and (4) actual or presumed
 19 damages. *Chowdhry*, 851 P.2d at 462. Libel, as defined by Nevada statute is:

20 a malicious defamation, expressed by printing, writing, signs, pictures or
 21 the like, tending to blacken the memory of the dead, or to impeach the
 22 honesty, integrity, virtue, or reputation, or to publish the natural defects of
 23 a living person or persons, or community of persons, or association of
 persons, and thereby to expose them to public hatred, contempt or
 ridicule.

24 NRS 200.510(1); *Wynn v. Smith*, 117 Nev. 6, 11, 16 P.3d 424, 427 (Nev.2001).

25 Plaintiff's Complaint states: "Defendants' conduct . . . severely harmed the reputation

1 and character of the Plaintiff with the making of false statements to third parties, both orally and
2 in writing. ...Plaintiff has suffered loss of reputation, shame, mortification and hurt feelings as a
3 result of the Defendants' deliberate, malicious, intentional, and oppressive conduct." Plaintiff
4 again is simply making allegations that are merely consistent with liability. Plaintiff alleges no
5 facts that any defamation was in writing or the like; however he alleges a claim for libel. He
6 must plead facts that a particular defendant may plausibly be liable for the alleged conduct.
7 Accordingly, this cause of action is dismissed with leave to amend.¹

8 CONCLUSION

9 **IT IS HEREBY ORDERED** that Defendants, The State of Nevada ex rel. Board of
10 Regents of Nevada System of Higher Education, on behalf of University of Nevada, Las Vegas
11 (collectively "UNLV") and Karen West's Motion to Dismiss(ECF No. 2) is **GRANTED in part**
12 **and DENIED in part consistent with this Order.**

13 Plaintiff's first cause of action for violation of his procedural and substantive due process
14 rights and his equal protection rights is **DISMISSED without prejudice.**

15 Plaintiff's claim for Breach of Contract is **DISMISSED against Defendant West**
16 **without prejudice.**

17 Plaintiff's claim for Negligence is **DISMISSED with prejudice.**

18 Plaintiff's claim for Negligent Hiring, Training and Supervision is **DISMISSED without**
19 **prejudice.**

20 Plaintiff's claim for Intentional Infliction of Emotional Distress is **DISMISSED without**
21 **prejudice.**

22 Plaintiff's claim for Negligent Infliction of Emotional Distress is **DISMISSED with**
23 **prejudice.**

24
25 ¹ Plaintiff also alleges a cause of action for injunctive and declaratory relief. The Court will not make a determination on these causes of action at this time, as their viability is contingent on whether or not Plaintiff's other claims survive.

1 Plaintiff's claim for Defamation, Libel and Slander Per Se is **DISMISSED without**
2 **prejudice.**

3 **IT IS FURTHER ORDERED** that Plaintiff is allowed to amend his claims dismissed
4 without prejudice **by close of business on Friday, October 28, 2011.**

5 DATED this 10th day of October, 2011.

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Gloria M. Navarro
United States District Judge
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